IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1626

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

Petitioners,

v.

AMERICAN MAIZE-PRODUCTS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

DANIEL F. KELLY,
7900 Hohman Avenue,
Hammond, Indiana 46324,
Attorney for Respondent.

TURNER, BRICKNER, KELLY
AND SHERIDAN,
7900 Hohman Avenue,
Hammond, Indiana 46324,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1628

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, UNINCORPORATED LABOR ORGANIZATIONS,

Petitioners,

vs.

AMERICAN MAIZE-PRODUCTS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 492 F. 2d 409.

JURISDICTION.

There are defects in the jurisdiction of this Court on the Petition for Certiorari because of the failure of petitioners to comply with the mandatory requirements of Rule 21(1) and Rule 23(1)(i) of this Court. Petitioners requested the Clerk

of the Court possessed of the record to certify the record to this Court but failed to furnish a copy of the request for certification and transmission of the record to the Respondent as required by Rule 21(1). Petitioners also failed to append a copy of the decision rendered by the United States District Court for the Northern District of Indiana, Hammond Division, in this case on December 7, 1972 as required by Rule 23(1)(i).

QUESTION PRESENTED.

The only issue which is presented to the Court on this Petition for Certiorari is as follows:

Is the Respondent, American Maize-Products Company, required to arbitrate a grievance which arose after the termination of the collective bargaining agreement between the parties?

STATUTE AND REGULATIONS INVOLVED.

The pertinent statute, being Section 301(a) of the Labor-Management Relations Act, is set forth in the Petition for Certiorari on pages 2 and 3.

In addition, Rule 21(1) of this Court, hereinbefore referred to, provides as follows:

> "1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. *A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.*" (Our emphasis)

Rule 23(1)(i), hereinbefore referred to, provides as follows:

> "(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, *including all opinions of courts or administrative agencies in the case,* and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions and companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented." (Our emphasis)

STATEMENT OF THE CASE.

This case originated through the filing by the Union (Petitioners herein) of a complaint in the United States District Court for the Northern District of Indiana to compel the Company (Respondent herein) to arbitrate a grievance. The written grievance of the Union is attached as Exhibit "B" to its complaint and it states "The Union's grievance is that the Company unlawfully locked out members of the bargaining unit * * *." The Company filed an answer to the complaint and subsequently filed a motion for summary judgment (supported by affidavit) on the ground that the grievance arose after the termination of the collective bargaining agreement between the parties. The Union also filed its motion for summary judgment supported by affidavit. After hearing oral argument on the respective motions for summary judgment, the District Court entered its order denying the motion of the Union for summary judgment and granting the motion of the Company for summary judgment on the ground that the collective bargaining agreement between the parties had terminated at the time the alleged grievance arose. Thereafter, the Union appealed to the Court of Appeals for the Seventh Circuit and the Court of Appeals affirmed the order of the District Court.

The Respondent in this case, American Maize-Products Company, is an employer in industry affecting commerce as defined in the Labor-Management Relations Act, and maintains and operates a manufacturing plant in Hammond, Indiana for the manufacture of products from corn. The Company employs approximately 482 hourly employees at this manufacturing plant, and these employees are represented by the plaintiff Union. (App. pp. 78 and 79)

On or about August 1, 1970, the Company and the Union entered into a collective bargaining agreement, a copy of which is attached to the complaint filed by the Union, made a part thereof, and marked Exhibit "A." (App. pp. 12 through 70) This collective bargaining agreement covers the wages, hours and working conditions of the hourly employees of the Company for a term from August 1, 1970 to August 1, 1972 and thereafter unless sixty days' notice is given by either party that it desires to amend or terminate the agreement. (App. p. 59)

By letter dated May 22, 1972 and a second letter dated June 22, 1972, the Union notified the Company that it desired to negotiate a new contract and negotiations on a new contract began in June of 1972. (App. pp. 79, 84 and 85)

The collective bargaining agreement in existence between the Union and the Company also provides that upon termination of the working agreement, the Union shall have the right to strike but only after giving the Company 72-hours' notice of the Union's intent to call a strike. The provision for the 72-hour notice of the intention of the Union to call a strike is for the purpose of affording the Company an opportunity for an orderly shutdown of the plant. (App. pp. 59 and 60)

Negotiations between the parties on a new collective bargaining agreement continued through the months of June and July, 1972, and on July 28, 1972, the Union served the Company with a notice that it intended to strike 72-hours from the effective date of the notice which meant that the Union would strike at 12:01 A.M. on August 1, 1972. (App. pp. 80 and 86)

After receiving this strike notice, the Company proceeded (at considerable expense) to shut down its plant in accordance with the notice and negotiations continued during the 72-hour period. On July 31, 1972 at 9:20 P.M. (less than three hours prior to the termination of the 72-hour period), the Union served the Company with a written document advising that the Union desired to withdraw the 72-hour notice to terminate the contract and extend the contract on a day-to-day basis with the right to re-serve the 72-hour strike notice. (App. pp. 80, 81 and 87)

At the time this attempt to withdraw the strike notice was made, the Company informed the Union that the shutdown of the plant had been completed in accordance with the 72-hour notice and that the strike was effective in accordance with the terms of the notice served by the Union, which notice had been acted upon by the Company to its detriment. (App. pp. 81 and 82)

In accordance with the terms of the 72-hour strike notice, the Company shut down its plant and did not schedule any unit employees to work on the shift beginning at 12:01 A.M. on August 1, 1972, and did not schedule any unit employees to work on any shift thereafter, and employees reporting to work between 11:00 P.M. and 12 Midnight on July 31, 1972, in order to work the shift beginning at 12:01 A.M. on August 1, 1972, were informed that they had not been scheduled because of the strike notice served by the Union. (App. p. 82)

Prior to the time that the Union served the strike notice on July 28th, the Union had not at any time suggested that the parties continue negotiations beyond the termination date of the collective bargaining agreement and continue the agreement on a day-to-day basis and had not requested any written extension of the collective bargaining agreement to permit further negotiations, despite the fact that the past practice of the parties had been to negotiate beyond the termination of the contract (prior to service of a strike notice) either under a day-to-day extension or with a definite extension of the contract. (App. p. 82)

ARGUMENT.

The general rules which establish the guidelines on the issue of the duty of an employer to arbitrate are set forth in the cases known as the Trilogy. In general, these cases hold that if there is a collective bargaining agreement and that agreement sets forth arbitration as a means of solving labor disputes, then there is a duty on the Company to arbitrate any grievance which it has agreed to arbitrate under the terms of the collective bargaining agreement. The cases also establish the rule that the question of arbitrability of any issue is a question for the courts and not the arbitrator. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

Since arbitration is a matter of contract and a company is only required to arbitrate what it has agreed to arbitrate under the terms of a collective bargaining agreement which is in force and effect at the time the issue sought to be arbitrated arises, it is clear that a company is not required to arbitrate a grievance which arises after the termination of the collective bargaining agreement in effect between the parties.

Since both the Company and the Union filed motions for summary judgment in this case and the Union also adopted the affidavit which the Company filed in support of its motion for summary judgment, it is clear that there is no dispute between the parties as to what the facts are which gave rise to the grievance which the Union is seeking to arbitrate. It is also clear that these facts lead inescapably to the conclusion that the collective bargaining agreement in effect between the parties had terminated at the time the grievance arose; and it is well settled that a Company is not required to arbitrate a grievance which arose after termination of the collective bargaining agreement.

Thus, in *Procter & Gamble Independent Union* v. *Procter & Gamble Manufacturing Co.*, 312 F. 2d 181 (2nd Cir. 1962) the Court held that an employer was not required to arbitrate a grievance which arose after the contract had been terminated under a notice by the Union and stated the rule in the following language: (p. 184)

> "We hold that the district court was correct in finding that the collective bargaining agreement which contained the applicable arbitration agreement expired by its own terms * * * It had, then, already expired before the occurrence of the activities out of which these grievances developed."

Also, in *Local Union No. 998, International Union United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO* v. *B. and T. Metals Co.*, 315 F. 2d 432 (6th Cir. 1963), the Court held that the Company was not required to arbitrate a lockout which had occurred after the collective bargaining agreement had expired by its terms. During the course of the opinion, the Court said: (p. 435)

> "If the agreement terminated according to its terms on May 3, and was not kept alive thereafter by reason of the negotiations between the parties, the no-lockout obligation on the part of the employer and its obligation to arbitrate the alleged grievance ceased to exist at the same time."

Another case which follows the universal rule that an employer cannot be required to arbitrate a grievance which arose after termination of the collective bargaining agreement is *International Brotherhood of Electrical Workers Local Union No. 1102, AFL-CIO* v. *Wadsworth Electric Manufacturing Co.*, 240 F. Supp. 292 (D. C. E. D. Ky. 1965) where the Court stated the rule very succinctly in the following language: (p. 293)

> "The first consideration in determining the issue presented in the case at bar is whether at the time of the claimed grievance there was a valid bargaining agreement in existence. The right to arbitrate the claimed grievance of Melton depends entirely upon a contract so providing."

The Union attempts to put the Company in a bad light in this case by stating on page 4 of its Petition for Certiorari that after withdrawal of the strike notice, the members of the bargaining unit were refused entry to the plant by "Employer armed security officers" and that after the work stoppage occurred, the Company maintained operations of its facility "by the hiring of persons not within the bargaining unit." Neither of these statements is true. The Company did not at any time have armed security guards at the plant, and the Company operated the plant later on during the work stoppage by the use of supervisors and not by hiring any persons outside the bargaining unit.

It is difficult to determine exactly what the Union's contention is in its Petition for Certiorari. However, it does appear that the Union is contending that the arbitrator and not the court should determine the arbitrability of the grievance.

Certainly, there is no principle more firmly established in the field of labor law than the one which states that the issue of arbitrability of a grievance is an issue which must be decided by the courts and not the arbitrator. This rule was established by this Court in the Trilogy cases (as hereinbefore pointed out) and also in the case of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962) where the Court stated that "Whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

On the basis of statements made on pages 10 and 11 of its Petition for Certiorari, it would also appear that the Union is contending that it was denied its right to a full evidentiary hearing in this case. Since the record in this case shows that both the Company and the Union filed motions for summary judgment in the District Court, this contention is totally inconsistent with the previous position of the Union in this case.

The Union states on page 9 of its Petition for Certiorari that it is important to note that the two decisions cited by the Court of Appeals in its opinion (*Baker* v. *Fleet Maintenance, Inc.*, 409

F. 2d 551 (7th Cir. 1969) and *Paterson Parchment Paper Co.* v. *International Brotherhood,* 191 F. 2d 252 (3rd Cir. 1951) cert. denied, 342 U. S. 933 (1952) did not contain a complaint to submit a labor dispute to arbitration. It is difficult for the Respondent to determine why that difference in those cases and the case at bar is significant because the two cases were cited by the Court of Appeals in support of the holding that the Union notice constituted a termination of the collective bargaining agreement.

Finally, the Union contends on page 9 of its Petition for Certiorari (in a desperate attempt to find some basis for the granting of its Petition) that the decision of the Court of Appeals in this case is in conflict with *Winston-Salem Printing Pressmen and Assistants Union* v. *Piedmont Publishing Co.,* 393 F. 2d 221 (4th Cir. 1968), and *H. K. Porter Co., Inc.* v. *Local 37, United Steelworkers of America,* 400 F. 2d 691 (4th Cir. 1968).

Even a cursory reading of the two cases cited by the Union establishes the fact that the decisions in those cases do not in any way conflict with the decision of the Court of Appeals in the case at bar. In the *Winston-Salem* case, the contract provided that the provisions of a new contract were matters subject to arbitration and the Court ordered arbitration because that was the agreement of the parties. In the *H. K. Porter Co.* case, it was undisputed that the grievance sought to be arbitrated arose during the term of the contract.

CONCLUSION.

In conclusion, Respondent submits that the Petition for Certiorari should be denied because: (1) there is no issue presented which is significant enough to justify the time of this Court in again reviewing legal principles already firmly established, (2) there is no reason for this Court to review a decision based upon its own peculiar facts, and (3) there is no conflict between the decision in this case and the decisions of this Court or the Courts of Appeal of any other circuits.

Respectfully submitted,

DANIEL F. KELLY,
5900 Hohman Avenue,
Hammond, Indiana 46320,
Attorney for Respondent.

TINKHAM, BECKMAN, KELLY
AND SINGLETON,
5900 Hohman Avenue,
Hammond, Indiana 46320,
Of Counsel.